S E R V E D
February 14, 2012
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 10-06

YAKOV KOBEL AND VICTOR BERKOVICH

v.

HAPAG-LLOYD A.G., HAPAG-LLOYD AMERICA, INC., LIMCO LOGISTICS, INC., AND INTERNATIONAL TLC, INC.

INITIAL DECISION[1]

I. INTRODUCTION

A. Overview and Summary of Decision

Complainants Yakov Kobel and Victor Berkovich filed a complaint for reparations against Respondents Hapag-Lloyd A.G. ("HLAG"), Hapag-Lloyd America, Inc. ("HLAI") (HLAG and HLAI collectively referred to as "Hapag-Lloyd"), Limco Logistics, Inc. ("Limco"), and International TLC, Inc. ("Int'l TLC") alleging violations of the Shipping Act of 1984 ("Shipping Act"), 46 U.S.C. § 40101 et seq.[2]

Complainants engaged Respondent Int'l TLC to assist in transporting a total of five shipper-owned containers of cargo from Portland, Oregon, to be delivered to Gdynia, Poland. Int'l

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[1] The initial decision will become the decision of the Commission in the absence of review by the Commission. Rule 227, Rules of Practice and Procedure, 46 C.F.R. § 502.227.

[2] On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. The bill's purpose was to "reorganiz[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law." H.R. Rep. 109-70, at 2 (2005).

TLC engaged Respondent Limco, a licensed non-vessel-operating common carrier ("NVOCC"), to provide the transportation services. Limco in turn engaged Respondent Hapag-Lloyd AG, an ocean common carrier, to physically transport the containers to Poland.

Respondents fulfilled their obligations and delivered all five containers to Gdynia, Poland. Respondents shipped and delivered four of the containers without any issues. Complainants paid for and picked up two of these containers. Complainants failed to pay the freight for the other two containers for over five months, resulting in the liquidation of these two containers. The fifth container was accidentally damaged in Portland, inadvertently shipped overseas, and delayed in Germany before being delivered to Poland. This damaged container was liquidated with the other two liquidated containers when the Complainants failed to pick it up for over two months after it arrived at its place of delivery in Poland. The issue in this case is whether the damage and delay to one container or liquidation of three containers violates the Shipping Act.

Complainants contend that all of the Respondents violated section 10(d)(1)[3] of the Shipping Act which provides that a "common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). Complainants also allege that Hapag-Lloyd and Limco violated sections 10(b)(4)(E) and 10(b)(10) by engaging in unfair shipping practices by unreasonably refusing to deal, negotiate, or settle Complainants' claim for the damaged container. 46 U.S.C. §§ 41104(4)(E), 41104(10). In addition, Complainants allege that Limco violated section 10(b)(11) by knowingly and willfully accepting cargo from an unlicensed ocean transportation intermediary ("OTI") and that Int'l TLC violated section 19(a) by operating as an unlicensed freight forwarder. 46 U.S.C. §§ 41104(11), 40901(a).

Respondents deny the allegations. Hapag-Lloyd states that "Complainants, who have the burden of proof to establish violations by a preponderance of the evidence, have not and cannot meet that burden with respect to any of the alleged violations." Hapag-Lloyd Brief at 4. Limco argues that damaging a container during loading, delay of the container due to damage, and the sale and liquidation of three containers due to nonpayment of all outstanding ocean freight, storage, and other charges, is not a violation of any provision of the Shipping Act. Limco Brief at 7. Int'l TLC claims that Complainants failed to prove that Int'l TLC violated the Shipping Act. Int'l TLC Brief at 1.

As discussed more fully below, the evidence does not demonstrate that the accidental damage, inadvertent loading, and delay of one of the Complainants' containers constitutes a violation of the Shipping Act. Moreover, the sale or liquidation of three containers was not

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[3] Section 10(d)(1) is now codified at 46 U.S.C. § 41102(c). The Commission often refers to provisions of the Act by their section numbers in the Act's original enactment, references that are well-known in the industry. *See, e.g., Worldwide Logistics Co., Ltd. – Possible Violations of Sections 10(a)(1) and 10(b)(2) of the Shipping Act of 1984*, FMC No. 11-04 (Mar. 30, 2011) (Order of Investigation and Hearing).

unreasonable under the circumstances. Although it is not clear whether Respondent Int'l TLC operated as an ocean transportation intermediary on these shipments, even if it did, there is no causal relationship to the damage. Accordingly, Complainants have not met their burden to demonstrate a Shipping Act violation. Prior to addressing specific findings of fact, analysis, and the Order, a summary of the procedural background and evidence is provided.

B. Procedural Background

This proceeding was initiated by a complaint filed with the Federal Maritime Commission alleging that the Respondents violated various provisions of the Shipping Act in connection with the transportation of three containers of cargo from Portland, Oregon, to Gdynia, Poland, in 2008. The Notice of Filling of Assignment and Complaint was issued on July 14, 2010. An Amended Complaint was filed on October 15, 2010. The Order on Dispositive Motions, issued May 24, 2011, granted in part and denied in part Respondent Hapag-Lloyd's motion to dismiss and/or for summary judgment and dismissed Complainants' claim for double damages.

A hearing was held in Portland, Oregon, from August 8-11, 2011. Eleven witnesses testified, including one by video conference from the Ukraine and one by telephone from Poland. Two interpreters took turns translating the testimony for the Complainants and other Russian speaking witnesses and another interpreter appeared by telephone for the witness who testified from Poland. The parties filed an Initial Statement of Undisputed Facts on June 9, 2011. Exhibits 1-136 from Complainants, exhibits 1-10 from Limco, and exhibits 1-67 from Int'l TLC were admitted at the hearing, after duplicate exhibits were removed. Complainants' post-trial brief and proposed findings of facts were received on September 28, 2011. Briefs from Hapag-Lloyd, Limco, and Int'l TLC were received on or about October 26, 2011. Post trial briefing was completed when Complainants filed their reply brief on November 9, 2011. The case is now ripe for decision.

C. Evidence

Under the Administrative Procedures Act ("APA"), an Administrative Law Judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *Steadman v. SEC*, 450 U.S. 91, 102 (1981). This Initial Decision is based on the pleadings, exhibits, testimony, transcripts, briefs, proposed findings of fact and conclusions of law, and replies thereto filed by the parties. Citations to specific numbered findings of fact in this Initial Decision are designated by "F."

This Initial Decision addresses only material issues of fact and law.[4] Proposed findings of fact not included in this Initial Decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the complaint or the defenses thereto. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959); *In re Amrep Corp.*, 102 F.T.C. 1362, 1670 (1983).

Part two provides specific findings of fact. Part three provides analysis and conclusions of law and includes a discussion of preliminary issues, arguments of the parties, statutory framework, legal analysis of allegations against each Respondent, in turn, and damages. Part four provides the Order.

II. FINDINGS OF FACT

A. Parties

1. Complainants Yakov Kobel and Victor Berkovich ("Complainants") were the owners of the following containers and the cargo contained therein at all times relevant to this proceeding: MOGU2002520, MOGU2051660, MOGU2101987, MOGU2112451, and MOGU2003255. Undisputed Fact No. 1.

2. At all material times, Hapag-Lloyd AG ("HLAG") was an ocean common carrier that maintained a published tariff in accordance with the Shipping Act of 1984, as amended and Federal Maritime Commission ("FMC") regulations. Said tariff contained a sample copy of HLAG's bill of lading and sea waybill, as required by FMC regulations. At all material times, Hapag-Lloyd (America), Inc. ("HLAI") was a duly designated agent of HLAG. HLAI did not, at any material time, act as an ocean common carrier. Undisputed Fact No. 2.

3. Limco Logistics, Inc. ("Limco") is, and was at all material times, an ocean transportation intermediary, licensed with the Federal Maritime Commission and operating lawfully as a non-vessel-operating common carrier ("NVOCC"). Undisputed Fact No. 3.

4. International TLC ("Int'l TLC") is an ocean transportation intermediary licensed with the Federal Maritime Commission as a non-vessel-operating common carrier effective on July 24, 2008. Int'l TLC was not licensed by the FMC before July 24, 2008. Undisputed Fact No. 4; Complainants' Exhibit 75.

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[4] To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

B. Initiating the Shipments

5. Complainants entered into an oral agreement with Int'l TLC between April 2008 and July 19, 2008, to ship five containers (MOGU2002520, MOGU2051660, MOGU2101987, MOGU2112451, and MOGU2003255) from Portland, Oregon, to Gdynia, Poland. Undisputed Fact No. 5.

6. Complainants did not inform Int'l TLC that any of the containers had to arrive by a specified deadline. Testimony of Aleksandr Barvinenko (Int'l TLC President), Tr. at 360, 396-97.

7. Int'l TLC made a booking for each of Complainants' five containers with Limco between April 2008 and July 2008. Limco then made a booking with HLAG through its agent HLAI. Undisputed Fact No. 6.

8. Int'l TLC provided Complainants with the telephone number for Limco. Testimony of Yakov Kobel, Tr. at 70.

9. Complainants purchased the containers herein at issue from Affordable Storage Containers in April of 2008 and Affordable Storage Containers invoiced Int'l TLC for the containers on April 25, 2008. Int'l TLC Exhibit 65; Complainants' Exhibit 121.

10. Complainants did not provide an email address to Int'l TLC but rather communicated with them by telephone. Testimony of Aleksandr Barvinenko, Tr. at 347.

11. Complainants contend that they received only an invoice for container shipping charges, but did not receive any bills of lading for any of these five containers at or near the time of shipping these containers. Testimony of Yakov Kobel, Tr. at 71.

12. Prior to the loading and shipping of the containers herein at issue, neither Complainant had any previous experience loading or shipping containers in international commerce. Undisputed Fact No. 36.

13. The Limco bills of lading name Viktor Verkovich (sic Victor Berkovich) as exporter and consignee. Undisputed Fact No. 10, 13, 18, 22, 24; Complainants' Exhibits 1, 8, 9, 12, 19.

14. None of the HLAG bills of lading or sea waybills issued with respect to the containers herein at issue named either of Complainants in any capacity. Undisputed Fact No. 37.

15. All five containers were booked and moved under Limco's service contract with HLAG. Exhibits HL-13 to HL-42; Testimony of Michael Lyamport (Limco President), Tr. at 696; Complainants' Exhibit 35; Testimony of Catherine Ward (Hapag-Lloyd Export Booking Coordinator), Tr. at 574.

16. Int'l TLC did not have a service contract and did not book any of the cargo herein at issue with Hapag-Lloyd. Testimony of Aleksandr Barvinenko, Tr. at 401.

17. Hapag-Lloyd's freight charges for the cargo it transported were paid by Limco. Testimony of Michael Lyamport, Tr. at 692, 695.

18. Baltic Sea Logistics was the agent at the destination port in Gydnia, Poland, designated by Int'l TLC. Undisputed Fact No. 17.

19. Baltic Sea Logistics was named as consignee on bills of lading and sea waybills issued by Hapag-Lloyd based on information provided to Hapag-Lloyd by Limco. Testimony of Aleksandr Barnvinenko, Tr. at 355; Testimony of Michael Lyamport, Tr. at 704-05.

20. Limco did not investigate the status of Int'l TLC with the Federal Maritime Commission to determine if Int'l TLC was a licensed ocean transportation intermediary when Complainants' five containers were shipped. Testimony of Michael Lyamport, Tr. at 707-08.

C. Containers MOGU2112451 and MOGU2003255

21. Containers MOGU2112451 and MOGU2003255 were shipped and picked up without incident, in contrast to the other three containers. Undisputed Fact No. 12, 15-16.

22. Limco made a booking for containers MOGU2112451 and MOGU2003255 with HLAG through its agent HLAI on or about April 28, 2008, to ship on a HLAG vessel, the Lisbon Express, leaving Portland, Oregon, on or about May 9, 2008. Undisputed Fact No. 7.

23. Complainants hired Western Container Transport to transport containers MOGU2112451 and MOGU2003255 from Complainants' lot in Clackamas, Oregon, to Terminal 6 at the Port of Portland. Undisputed Fact No. 8.

24. Limco issued house bill of lading LIM16091 for container MOGU2112451 dated May 9, 2008, listing Viktor Verkovich (sic Victor Berkovich) as exporter and consignee. The bill of lading lists the forwarding agent as Limco as agent for Int'l TLC. The bill of lading lists [Ba]ltic Sea Logistics SP ZOO of Gdynia, Poland, under domestic routing/export instructions. Undisputed Fact No. 10.

25. HLAG issued sea waybill HLCUATL080515983, dated May 8, 2008, for container MOGU2112451 with Limco listed as shipper and [Ba]ltic Sea Logistics SP Z00 as consignee and notify party. Undisputed Fact No. 11.

26. Container MOGU2112451 departed from Portland, Oregon, on the Lisbon Express on or about May 8, 2008. It arrived in Gydnia, Poland, via transshipment in Hamburg, Germany, on or about July 2, 2008. It was not damaged during loading, transit, or discharge. Undisputed Fact No. 12.

27. Limco issued house bill of lading LIM16206 for container MOGU2003255 dated May 25, 2008. This bill of lading lists Viktor Verkovich (sic Victor Berkovich) as exporter and consignee, and the forwarding agent as Limco as agent for Int'l TLC. The bill of lading lists [Ba]ltic Sea Logistics SP ZOO of Gdynia, Poland, under domestic routing/export instructions. Undisputed Fact No. 13; Complainants' Exhibit 9.

28. HLAG issued bill of lading HLCUATL080515994 dated May 26, 2008, for container 2003255. Limco is listed as the shipper and [Ba]ltic Sea Logistics SP ZOO as consignee and notify party. Undisputed Fact No. 14.

29. Container MOGU2003255 departed from Portland, Oregon, on the Helsinki Express on or about May 25, 2008. It arrived in Gydnia, Poland, via transshipment in Hamburg, Germany, on or about July 2, 2008. It was not damaged during loading, transit, or discharge. Undisputed Fact No. 15.

30. Complainants paid Int'l TLC for containers MOGU2112451 and 2003255 between April and July, 2008. Complainants' Exhibit 107.

31. Hapag-Lloyd notified Baltic Sea Logistics of the arrival of containers MOGU2112451 and MOGU2003255 on July 1, 2008. Hapag-Lloyd Exhibits 124, 126.

32. Int'l TLC paid Limco for the shipment of container MOGU2112451 on May 13, 2008, and for container MOGU2003255 on July 1, 2008. Complainants' Exhibits 116-17.

33. Containers MOGU2112451 and MOGU2003255 were picked up by Complainants on or about November 21, 2008, when they were taken by truck from the port of Gydnia to the Ukraine. Undisputed Fact No. 16.

34. The goods in containers MOGU2112451 and MOGU2003255 have not been sold. Testimony of Victor Berkovich, Tr. at 526-27; *see also* Testimony of Yakov Kobel, Tr. at 129, 219.

D. Liquidated Containers MOGU2051660 and MOGU2101987

35. Int'l TLC booked a reservation with Limco to ship containers MOGU2051660 and MOGU2101987 on the Lisbon Express departing from Portland, Oregon, to Gdynia, Poland. Undisputed Fact No. 21.

36. Container MOGU2051660 was initially too heavy and was returned to the Complainants; however, it was accepted later that day. Complainants' Exhibit 39; Testimony of Victor Berkovich, Tr. at 494.

37. Limco issued house bill of lading LIM16803 for container MOGU2101987 listing Viktor Berkovich as shipper and consignee and dated July 19, 2008. The bill of lading lists [Ba]ltic Sea Logistics SP ZOO of Gdynia, Poland, under domestic routing/export instructions. Undisputed Fact No. 22; Complainants' Exhibit 19.

38. HLAG issued bill of lading HLCUATL080733786 for container MOGU2101987 on July 19, 2008. The bill of lading lists Limco as shipper and [Ba]ltic Sea Logistics as consignee and notify party. Undisputed Fact No. 23.

39. Limco issued house bill of lading LIM16802 for container MOGU2051660 dated July 19, 2008, listing Victor Berkovich as shipper and consignee. The bill of lading lists [Ba]ltic Sea Logistics SP ZOO of Gdynia, Poland, under domestic routing/export instructions. Undisputed Fact No. 24; Complainants' Exhibit 12.

40. HLAG issued sea waybill HLCUATL08733775 for container MOGU2051660 on July 19, 2008. Limco is listed as shipper and [Ba]ltic Sea Logistics SP ZOO is listed as consignee and notify party. Undisputed Fact No. 25.

41. Containers MOGU2101987 and MOGU2051660 were shipped from Portland, Oregon, on or about July 9, 2008, and arrived in Gdynia, via transshipment in Hamburg, Germany, on or about September 1, 2008. These two containers were not damaged during loading, transit, or discharge. Undisputed Fact No. 26.

42. Freight charges on containers MOGU2101987 and MOGU2051660 were not paid in full by Claimants to Int'l TLC until April of 2009. Payments were made on January 9, 2009, March 26, 2009, and April 2, 2009. Complainants' Exhibit 111.

43. Limco placed a hold on containers MOGU2101987 and MOGU2051660 due to non-payment of freight. Testimony of Michael Lyamport, Tr. at 702-03; Limco Exhibit 52, ¶ 11.F; Limco Exhibit 53, ¶ 17; Hapag-Lloyd Exhibit 64.

44. Int'l TLC did not pay Limco for the shipment of container MOGU2101987 until March 4, 2009, and for container MOGU2051660 on December 22, 2008. Complainants' Exhibits 119-20.

E. Damaged and Liquidated Container MOGU2002520

45. Limco made a booking for container MOGU2002520, along with containers MOGU2112451 and MOGU2003255, with HLAG through its agent HLAI on or about April 28, 2008, to ship on a HLAG vessel, the Lisbon Express, leaving Portland, Oregon, on or about May 9, 2008. Undisputed Fact No. 7.

46. Container MOGU2002520 was loaded by Complainants, with assistance from other individuals. Undisputed Fact No. 35.

47. Complainants hired Western Container Transport to transport containers MOGU2002520 from Complainants' lot in Clackamas, Oregon, to Terminal 6 at the Port of Portland. Undisputed Fact No. 8.

48. Western Container Transport delivered container MOGU2002520 to Terminal 6 at the Port of Portland on or about May 7, 2008. Undisputed Fact No. 9.

49. Limco issued a house bill of lading LIM16090 for container MOGU2002520. Complainant Viktor Verkovich (sic Victor Berkovich) is listed as exporter and consignee. As forwarding agent, the bill of lading stated: "Limco Logistics, Inc. as agent for International TLC." For domestic routing/export intermediary this bill of lading stated [Ba]ltic Sea Logistics SP ZOO of Gdynia, Poland. Undisputed Fact No. 18; Complainants' Exhibit 1.

50. HLAG issued sea waybill HLCUATL080515961 for container MOGU2002520 on May 25, 2008, and named Limco as shipper and [Ba]ltic Sea Logistics SP ZOO as consignee and notify party. Undisputed Fact No. 19.

51. Container MOGU2002520 was damaged at the Port of Portland in the course of loading the container in the hold of the HLAG vessel (Lisbon Express) on or about May 8, 2008. Complainants' Exhibit 47; Testimony of William Furer (Hapag-Lloyd Manager of Operations, Pacific Northwest), Tr. at 539.

52. The marine terminal incident report states: "While placing the container below deck, the container became wedged in the cell guides and was damaged. The container was already in the cell guides and going down when unforseen causes wedged the container half way down. The container was brought to the dock and found to have damage to the top rails and sides of the front of the container. The container was not able to load due to the condition of the container." Complainants' Exhibit 47.

53. A May 9, 2008, email from Hapag-Lloyd maintenance repair manager to Hapag-Lloyd employee Catherine Ward states the cargo needed to be transloaded into a good order unit, as the "current unit is damaged to point that it will not load vessel," and to find out how the customer wanted to handle it. Complainants' Exhibit 90 at 6.

54. Hapag-Lloyd immediately notified Limco of the damage to container MOGU2002520. Complainants' Exhibit 90 at 6.

55. On or about May 9, 2008, Complainant Yakov Kobel was contacted telephonically by Limco and Int'l TLC informing him that his container MOGU2002520 was damaged at the Port of Portland during the loading process to load the container onto the vessel. Testimony of Yakov Kobel, Tr. at 77; *see also* Testimony of William Furer, Tr. at 540.

56. On Friday, May 9, 2008, Limco asked Hapag-Lloyd who would be responsible for the inland trucking fees, transloading, and purchase of a new container. Complainants' Exhibit 90 at 6.

57. On Monday, May 12, 2008, Hapag-Lloyd offered to transfer the contents of the damaged container to another container. Complainants' Exhibit 90 at 5.

58. On May 13, 2008, Complainants, through Limco, rejected Hapag-Lloyd's offer to transfer the cargo to another shipper-owned container and requested that the damaged container be returned to their yard for inspection, transloading, or repair. Complainants' Exhibit 90 at 4-5; Testimony of Yakov Kobel, Tr. at 80.

59. Hapag-Lloyd agreed to this request in principle, and requested documentation of the costs, for which Hapag-Lloyd would bear initial responsibility, but the terminal operator would bear ultimate responsibility. Testimony of William Furer, Tr. at 542, 544; Complainants' Exhibit 90 at 5.

60. On May 16, 2008, Complainants requested a total of $10,250, not including any damaged cargo, to transfer the shipment to another container. Complainants' Exhibit 90 at 3.

61. In an undated fax, Complainants submitted several pages of documents to Limco including estimates for the cost of transportation and unloading and reloading, plus the costs of replacing the container, with the expectation that Limco would forward these documents to Hapag-Lloyd. Complainants' Exhibit 67; Testimony of William Furer, Tr. at 544-45.

62. The costs submitted by Complainants included a charge of $4,850 for the damaged container, which had cost Complainants only $1,700. Complainants' Exhibits 67 at 8, 90 at 3, 121, 123.

63. Hapag-Lloyd considered this expense excessive. Testimony of William Furer, Tr. at 543. Hapag-Lloyd could have transloaded the cargo more quickly and less expensively than Complainants. Testimony of William Furer, Tr. at 545.

64. A contemporaneous email on May 16, 2008, from Hapag-Lloyd states: "This proposal is way out of hand and unreasonable demand on part of the shipper." Complainants' Exhibit 90 at 3.

65. On May 16, 2008, through Limco, Complainants asked to inspect the damaged container, a request that Hapag-Lloyd denied based on federal security regulations. Complainants' Exhibit 90; Testimony of William Furer, Tr. at 541.

66. On May 30, 2008, Hapag-Lloyd was reviewing the costs and asked permission to open one door of the container. Complainants' Exhibit 90 at 1.

67. Limco denied the request to open the damaged container without Complainants present. Complainants' Exhibit 90 at 1.

68. The damaged container, MOGU2002520, was isolated in the yard, set aside from the rest of the containers on the pier awaiting disposition. Testimony of William Furer, Tr. at 540.

69. Because resolution of a dispute such as this is normally routine, Hapag-Lloyd's personnel expected the dispute to be resolved prior to the arrival of the next Hapag-Lloyd vessel in Portland. Testimony of Catherine Ward, Tr. at 577.

70. Hapag-Lloyd rolled the booking and assigned the vessel so that if the container was repaired or transloaded, it would have guaranteed space. Testimony of Catherine Ward, Tr. at 577.

71. When the next Hapag-Lloyd vessel called in Portland, Oregon, the damaged container was inadvertently loaded on that vessel, on or before June 2, 2008. Hapag-Lloyd Exhibit 62; Testimony of William Furer, Tr. at 547.

72. Hapag-Lloyd promptly notified Limco of the inadvertent loading of the damaged container. Hapag-Lloyd Exhibits 62, 66; Testimony of Michael Lyamport, Tr. at 698.

73. There was no financial benefit to Hapag-Lloyd in loading the damaged container as compared to keeping it in Portland. Testimony of William Furer, Tr. at 547.

74. The only way this shipper owned container was treated differently from a Hapag-Lloyd owned container is that Hapag-Lloyd would have been allowed to transload it. Testimony of William Furer, Tr. at 547.

75. Complainants never authorized Hapag-Lloyd or Limco to ship the damaged container MOGU2002520 but rather were "persistently demanding" its return. Testimony of Yakov Kobel, Tr. at 80-81.

76. Hapag-Lloyd shipped the damaged container, MOGU2002520, on the Helsinki Express, which departed from Portland, Oregon, on May 26, 2008, and arrived in Hamburg, Germany, in late June or early July 2008. Hapag-Lloyd Exhibit 62; Testimony of Catherine Ward, Tr. at 576-79; Complainants' Exhibit 98 at 1.

77. On July 1, 2008, Hapag-Lloyd commented that "Overseas shipper from this side is looking for opportunities to claim." Complainants' Exhibit 91.

78. Int'l TLC paid Limco for the shipment of container MOGU2002520 on July 30, 2008. Complainants' Exhibits 118.

79. The feeder operator that was to transport container MOGU2002520 from Hamburg, Germany, to Gdynia, Poland, would not accept the container due to the damage it had suffered. Complainants' Exhibit 93 at 1.

80. The cargo in container MOGU2002520 was eventually transferred to another container, as explained more fully below. The replacement container, and the now empty MOGU2002520, arrived in Gdynia, Poland, on or about December 23, 2008. Undisputed Fact No. 20.

81. Hapag-Lloyd, in accordance with its standard procedures, contacted the consignee Baltic Sea Logistics to obtain instructions about how to deal with the damaged container. Testimony of Catherine Ward, Tr. at 579-80.

82. Baltic Sea Logistics refused to take the container because it was not in touch with the ultimate consignee of the cargo and did not have commercial documents for customs. Hapag-Lloyd Exhibit 68.

83. Hapag-Lloyd, in accordance with its standard procedures for situations in which it is unable to obtain instructions from the consignee, then contacted the consignor of the cargo, Limco. Limco instructed Hapag-Lloyd to deliver the cargo to Gdynia, Poland. Testimony of Catherine Ward, Tr. at 579-82.

84. Hapag-Lloyd requested that Limco get confirmation from the shipper that Hapag-Lloyd could terminate the shipment of the damaged container in Hamburg, Germany. Complainants' Exhibit 95.

85. Limco refused to accept this proposal and insisted the container be delivered to the agreed destination of Gdynia, Poland. Complainants' Exhibits 92, 95 at 4.

86. In a September 23, 2008, email from Hapag-Lloyd to Limco, Hapag-Lloyd explained that "we have no way to transport the container to Gdynia" because "1. We can't ship it with feeder vessel to Gdynia, because of the damage. 2. Consignee can't pick it up directly in Hamburg, because they can't do the customs clearance in Hamburg. 3. We can't truck it to Gdynia, because of missing documents for the customs clearance." Complainants' Exhibit 96.

87. In Hapag-Lloyd's September 23, 2008, email, Hapag-Lloyd stated that "We need your decision/answer if you can arrange customs clearance" and "If you can't, we will dispose cargo and start the abandon cargo procedure." Complainants' Exhibit 96.

88. A September 25, 2008, email states that polish consignee (Baltic Sea Logistics) indicates that he can pick up the damaged container from Gdynia port only if the customer will be in touch with him and that there are two more shipper owned containers in Gdynia for the same customer "but no cooperation with him." Complainants' Exhibit 97 at 2; *see also* Limco Exhibit 3; Hapag-Lloyd Exhibit 72.

89. Hapag-Lloyd was receiving conflicting instructions from the consignor and consignee of container MOGU2002520. Testimony of Catherine Ward, Tr. at 584.

90. Throughout September and in to October of 2008, Hapag-Lloyd worked with Limco to try to deliver the container via alternate means, including delivery by truck to Poland, delivery by truck directly to the Ukraine, and delivery by rail. Complainants' Exhibits 95, 96, 97.

91. Additional documents for customs clearance for MOGU2002520 were sent on or before October 7, 2008. Complainants' Exhibit 97.

92. By letter dated October 29, 2008, Baltic Sea Logistics advised Hapag-Lloyd that it did not authorize anyone to name it as consignee of the five containers and that it could not provide instructions with respect to same. Complainants' Exhibit 101.

93. On October 31, 2008, Limco sent a claim to Hapag-Lloyd. Complainants' Exhibit 98 at 1.

94. On November 2, 2008, Hapag-Lloyd told Limco that the consignee would not pick up the damaged container in Hamburg, Germany, or in Gdynia, Poland, and asked what to do with the container. Complainants' Exhibit 100 at 2.

95. On November 5, 2008, Hapag-Lloyd received assurances from Limco that if the cargo could be delivered to Gdynia, it would be picked up promptly. Complainants' Exhibit 100 at 2.

96. On November 11-12, 2008, the contents of the damaged container were transferred to another container and a survey was completed. Complainants' Exhibit 46; Complainants' Exhibit 100 at 1.

97. By e-mail dated November 13, 2008, Baltic Sea Logistics informed Int'l TLC that it had not received any payment for its services and that, due to other problems with the five containers, it would provide no further services in connection with same. Complainants' Exhibit 102.

98. On November 15, 2008, Complainant Kobel faxed a letter to Limco to be forwarded to Hapag-Lloyd demanding $77,700 based on damage and delay to container MOGU2002520. Complainants' Exhibit 69; Testimony of Yakov Kobel, Tr. at 87-89.

99. The cargo in container MOGU2002520 was transferred to another container and left Germany for Poland, on or about November 15, 2008. Complainants' Exhibit 100 at 1.

100. Container MOGU2002520, once empty, could be transported by truck without difficulty. Complainants' Exhibit 93 at 4.

101. Transloading of the cargo in container MOGU2002520 to another container and transport of the replacement container and empty container MOGU2002520 from Germany to Poland were performed at Hapag-Lloyd's expense. Complainants' Exhibit 94; Testimony of Michael Lyamport, Tr. at 732, 738-39.

102. Once the container and cargo were in Poland, the cargo was transferred back into MOGU2002520. Testimony of Katarzyna Ossowska (Hapag-Lloyd Specialist for Import Matters), Tr. at 652-53.

103. The damaged container arrived in Gdynia, Poland, in December, 2008. Testimony of Aleksandr Barvinenko, Tr. at 379.

F. Liquidation of MOGU2002520, MOGU2051660, and MOGU2101987

104. Containers MOGU2051660 and MOGU2101987 accrued storage charges in Gdynia from early September 2008 until they were liquidated in February 2009. Limco Exhibits 5, 7; Hapag-Lloyd Exhibit 101.

105. On October 28, 2008, Limco emailed Int'l TLC that "Should you not respond to this letter nor arrange for either the pick-up of the container or for new shipping instructions to be provided to us [by October 31, 2008], we will consider the subject containers to be abandoned and will have to confiscate it." Limco Exhibit 5.

106. On November 10, 2008, Hapag-Lloyd sent a letter to Limco stating "As you failed to pick up the containers, the cargo is deemed to have been abandoned and we will now proceed to the sale or disposal of the cargo, at the Carrier's option, without further notice or delay." Limco Exhibit 7.

107. On December 18, 2008, Baltic Sea Logistics and Limco emailed Int'l TLC, regarding containers MOGU2051660 and MOGU2101987 stating that "They are still waiting at Gdynia port . . . . The costs of the demurrage are very high yet and still increase!" and that if a response is not received by the end of December 2008, they will be unloaded and the cargo utilized. Hapag-Lloyd Exhibit 101.

108. On January 9, 2009, Int'l TLC sent a letter to Complainants entitled "Final Notice of Unpaid Balance," advising them that containers MOGU2051660 and MOGU2101987 remained in the port of Gdynia, that freight on those containers had not been paid, and that unless payment in full was made within five days, by January 14, 2009, the cargo would be utilized to cover all amounts due. Complainants' Exhibit 79.

109. Int'l TLC's January 9, 2009, letter to Complainants lists an unpaid balance of $43,727.73 for freight and other charges. Complainants' Exhibit 80; Testimony of Victor Berkovich, Tr. at 379-80.

110. Complainant Kobel testified that he received the January 9, 2009, letter, "but I ignored it because it's an incorrect letter." Testimony of Yakov Kobel, Tr. at 232.

111. After telephone conversations with Complainant Kobel, Int'l TLC issued a revised invoice listing just the unpaid freight charges for containers MOGU2051660 and MOGU2101987, which totaled $10,200. Ex. 81; Testimony of Aleksandr Barvinenko, Tr. at 382.

112. Complainants paid $1,500 of the outstanding balance on or about January 9, 2009, although he had promised to pay the full amount. Complainants' Exhibits 111, 113; Testimony of Aleksandr Barvinenko, Tr. at 382.

113. In an e-mail dated February 3, 2009, Baltic Sea Logistics threatened to hold Int'l TLC liable for storage costs for the three containers remaining at the Port of Gdynia, and demanded action by February 6, 2009. Complainants' Exhibit 103.

114. After receiving the February 3, 2009, e-mail from Baltic Sea Logistics, Int'l TLC decided it had to take action to liquidate the containers. Testimony of Aleksandr Barvinenko, Tr. at 400.

115. On or about February 13, 2009, Complainants contacted Baltic Sea Logistics in Gdynia, Poland, regarding storage fees for containers MOGU2002520, MOGU2051660, and MOGU2101987, and Baltic Sea Logistics responded that it needed payment. Complainants' Exhibit 104.

116. Int'l TLC advertised the containers for sale with a sign in its office. Testimony of Aleksandr Barvinenko, Tr. at 383.

117. On or about February 23, 2009, Int'l TLC entered into an agreement with Oleg Remishevskiy to sell the containers and their contents to Mr. Remishevskiy for $9,900 and fees owed to Baltic Sea Logistics. Complainants' Exhibit 82; Testimony of Oleg Remishevskiy, Tr. at 304, 308-09.

118. Int'l TLC notified Limco via email on March 2, 2009, to issue a change to bill of lading LIM16090 for container MOGU2002520, bill of lading LIM16802 for container MOGU2051660, and bill of lading LIM16803 for container MOGU2101987 to change the listed exporter and consignee on each Limco bill of lading from Victor Berkovich to Oleg Remishevskiy. Undisputed Fact No. 27.

119. Limco notified Hapag-Lloyd of the new shipper/consignee details for containers MOGU2002520, MOGU2051660, and MOGU2101987 on March 2, 2000. Complainants' Exhibit 87.

120. Complainants did not authorize nor consent to the change of shipper and consignee on the bills of lading for containers MOGU2002520, MOGU2051660, and MOGU2101987. Undisputed Fact No. 30.

121. Hapag-Lloyd did not authorize the change of shipper and consignee of the Limco bills of lading for containers MOGU2002520, MOGU2051660, and MOGU2101987. Undisputed Fact No. 31.

122. On March 2, 2009, Limco notified Baltic Sea Logistics in Gdynia, Poland, that the shipper/consignee on the Limco bills of lading had been changed to Oleg Remishevskiy for the three containers, MOGU2002520, MOGU2051660, and MOGU2101987. A copy of the new Limco bills of lading were attached to the email from Limco. Undisputed Fact No. 29.

123. Storage charges on the liquidated containers were paid to Baltic Sea Logistics. Testimony of Oleg Remishevskiy, Tr. at 328-29.

124. Hapag-Lloyd was not involved in the liquidation sale of containers MOGU2002520, MOGU2051660, and MOGU2101987, and did not receive any of the proceeds of that liquidation sale. Undisputed Fact No. 34.

125. Complainants thereafter paid Int'l TLC $7,065.00 on or about March 26, 2009, and $1,635.00 on or about April 2, 2009. Complainants' Exhibits 111, 114.

126. Complainant Victor Berkovich testified that he and another person, who was to resolve issues with documents, went to pick up the containers at the container terminal in Gdynia, Poland, on April 6, 2009, but discovered that the containers were no longer there. Testimony of Victor Berkovich, Tr. at 481-82.

127. Complainants did not learn or discover that the bills of lading had been changed for containers MOGU2002520, MOGU2051660, and MOGU2101987 from Victor Berkovich to Oleg Remishevskiy until after April 6, 2009. Undisputed Fact No. 32.

128. Int'l TLC accepted the freight payments made by Complainants for containers MOGU2051660 and MOGU2101987. Complainants' Exhibit 111; Testimony of Aleksandr Barvinenko, Tr. at 386-87.

129. Int'l TLC refunded the payments to Complainants for freight for MOGU2051660 and MOGU2101987 on May 13, 2009, after Complainant Yakov Kobel demanded information regarding his containers in person at Int'l TLC's office on or about May 5, 2009. Complainants' Exhibits 88, 89; Testimony of Aleksandr Barvinenko, Tr. at 387.

130. At the time Int'l TLC sold the above-three containers to Oleg Remishevskiy, on February 23, 2009, it was licensed with the Federal Maritime Commission as an NVOCC. Complainants' Exhibit 75.

G. Value of Liquidated Goods

131. Complainants paid full retail price for the plywood and oil shipped in the containers herein at issue. Testimony of Yakov Kobel, Tr. at 215.

132. Complainants claim that they purchased the cargo at the value stated in the packing list for the cargo for each of the three containers, MOGU2002520, in the sum of $13,770, MOGU2051660, in the sum of $42,836, and MOGU2101987, in the sum of $57,720. Complainants' Exhibits 50-65, 132-34.

133. Complainants purchased three containers, MOGU2002520, MOGU2051660, and MOGU2101987 for $1,700 each from Affordable Storage on or about April 28, 2008, for a total sum of $5,100. Complainants paid transportation costs for these containers in the sum of $2,046, for a total expense of $7,146 for Complainants. Complainants' Exhibits 121, 122, 123.

134. The parties were not certain whether the oil in containers MOGU2051660 and MOGU2101987 could have been imported into the Ukraine, given its packaging and labeling. Testimony of Yakov Kobel, Tr. at 250, 253; Testimony of Aleksandr Barvinenko, Tr. at 383.

135. Complainants had no written contracts for the sale of the goods in MOGU2002520, MOGU2051660, and MOGU2101987. Undisputed Fact No. 33.

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Preliminary Issues

1. Jurisdiction

Respondent Hapag-Lloyd challenges subject matter jurisdiction. Hapag-Lloyd argues that because "the Complainants' true grievances are based in tort or cargo loss/damage, the Commission lacks subject matter jurisdiction over their claims." Hapag-Lloyd Brief at 27. Hapag-Lloyd contends that "federal courts have held that claims for cargo loss or damage cloaked in negligence, fraud, conversion and breach of contract theories are pre-empted by [Carriage of Goods by Sea Act ("COGSA")];" that Complainant "Kobel referred repeatedly to a 'fraud' perpetrated upon him by respondents;" and that Complainants' counsel "characterized the conduct of Hapag-Lloyd as 'negligence' and the Complainants' claim as one for 'conversion.'" Hapag-Lloyd Brief at 27-28.

Complainants contend that COGSA does not apply to this case and that the Commission has jurisdiction to determine whether there was a violation of the Shipping Act. Complainants' Reply at 2-4. Complainants contend that the seaway bill is unenforceable, or, that the shipment of the damaged container was an unreasonable deviation from the contract of carriage. Complainants' Reply at 3.

The Shipping Act provides that a "person may file with the . . . Commission a sworn complaint alleging a violation of this part." 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, 30 S.R.R. 991, 999 (FMC 2006); *see also Cargo One, Inc. v. Cosco Container Lines Co., Ltd.*, 28 S.R.R. 1635, 1645 (FMC 2000) (allegations of violations of section 10(d)(1) involving just and reasonable regulations and practices "are inherently related to Shipping Act prohibitions and are therefore appropriately brought before the Commission.").

Complainants allege violations of the Shipping Act for conduct both before loading on the ship and after discharge at the port. *See Kuzela v. A.P. Moller-Maersk A/S*, Docket 1883(F) (ALJ Dec. 13, 2007) (Memorandum and Order on Motion to Dismiss for Lack of Jurisdiction or in the Alternative, to Dismiss the Complaint Based on the Statute of Limitations and/or Limiting Damages to $500 per Package under COGSA). Moreover, this case does not involve merely the damage and delay of one container, but the shipment of five containers and the liquidation of three containers.

In the case at bar, two previous motions to dismiss for subject matter jurisdiction were denied. Order on Motion to Dismiss and Motion to Substitute a Party, or Alternatively Motion to Amend Complaint (ALJ September 28, 2010); Order on Dispositive Motions (ALJ May 24, 2011). Hapag-Lloyd has not presented any reason to alter the analysis in those Orders. Accordingly, Complainants' claims will not be dismissed for lack of subject matter jurisdiction.

2. Burden of Proof

To prevail in a proceeding brought to enforce the Shipping Act, a complainant has the burden of proving by a preponderance of the evidence that the respondents violated the Act. 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); 46 C.F.R. § 502.155; *Sea-Land Serv. Inc.*, 30 S.R.R. 872, 889 (FMC 2006); *Exclusive Tug Franchises*, 29 S.R.R. 718, 718-19 (ALJ 2001). "[A]s of 1946 the ordinary meaning of burden of proof was burden of persuasion, and we understand the APA's unadorned reference to 'burden of proof' to refer to the burden of persuasion." *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party with the burden of persuasion must prove its case by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 102 (1981). "[W]hen the evidence is evenly balanced, the [party with the burden of persuasion] must lose." *Greenwich Collieries*, 512 U.S. at 281. It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman S.S. Corp. v. General Foundries Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (FMC 1994).

B. Arguments of the Parties

Complainants allege a number of violations of the Shipping Act by each of the Respondents. Complainants' Brief at 1. In their well-organized brief, Complainants address each Respondent, in turn, and specify the sections of the Shipping Act which they allege are violated. Complainants allege that all of the Respondents violated section 10(d)(1); that Hapag-Lloyd and Limco also violated sections 10(b)(4)(E) and 10(b)(10); that Limco also violated section 10(b)(11); and that Int'l TLC also violated section 19(a). Complainants' Brief at 2-35. Complainants also specifically discuss damages and the risk of duplicative claims. Complainants' Brief at 36-39.

Hapag-Lloyd contends that the Commission lacks subject matter jurisdiction; that it did not violate any of the Shipping Act provisions alleged; and that the Complainants are not entitled to reparations. Hapag-Lloyd Brief at 4. Hapag-Lloyd states that "Complainants, who have the burden of proof to establish violations by a preponderance of the evidence, have not and cannot meet that burden with respect to any of the alleged violations." Hapag-Lloyd Brief at 4.

Limco asserts that it did not violate the Shipping Act. Limco argues that damaging a container during loading, delay of the container due to damage, and the sale and liquidation of three containers due to nonpayment of all outstanding ocean freight, storage, and other charges, is not a violation of any provision of the Shipping Act. Limco Brief at 7.

Int'l TLC claims that Complainants failed to prove that Int'l TLC violated the Shipping Act. Int'l TLC Brief at 1. Int'l TLC contends that Complainants' "failure to observe their duty to make proper payments and to timely pick up their cargo in Poland does not establish a Shipping Act violation" and that liquidation of the cargo was not a Shipping Act violation. Int'l TLC Brief at 3, 10.

C. Statutory Framework

The Shipping Act defines and regulates a number of different types of entities that are involved in the international shipment of goods by water, including two types of ocean transportation intermediaries. "The term 'ocean transportation intermediary' means an ocean freight forwarder or a non-vessel-operating common carrier." 46 U.S.C. § 40102(19).

"The term 'ocean freight forwarder' means a person that – (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments." 46 U.S.C. § 40102(18). "The term 'non-vessel-operating common carrier' means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(16).

The statutory definitions are echoed in the Commission's regulations:

> *Ocean transportation intermediary* means an ocean freight forwarder or a non-vessel-operating common carrier. For the purposes of this part, the term

(1) *Ocean freight forwarder* means a person that –

(i) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and

(ii) processes the documentation or performs related activities incident to those shipments; and

(2) *Non-vessel-operating common carrier ("NVOCC")* means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

46 C.F.R. § 515.2(o).

Complainants allege that all of the Respondents violated section 10(d)(1) of the Shipping Act, which states:

(c) Practices in Handling Property. - A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

46 U.S.C. § 41102(c).

Complainants also allege that Hapag-Lloyd and Limco violated section 10(b)(4)(E) and 10(b)(10) of the Shipping Act and that Limco violated section 10(b)(11). These sections state:

A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not -

. . .

(4) for service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice in the matter of -

. . .

(D) loading and landing of freight; or

(E) adjustment and settlement of claims;

. . .

(10) unreasonably refuse to deal or negotiate;

(11) knowingly and willfully accept cargo from or transport cargo for the account of an ocean transportation intermediary that does not have a tariff as required by section 40501 of this title and a bond, insurance, or other surety as required by section 40902 of this title; or

46 C.F.R. §§ 41104(4)(D), 41104(4)(E), 41104(10), 41104(11).

Complainants allege that Int'l TLC violated section 19(a), 46 U.S.C. §40901, which states:

§ 40901. License requirement

(a) In general.– A person in the United States may not act as an ocean transportation intermediary unless the person holds an ocean transportation intermediary's license issued by the Federal Maritime Commission. The Commission shall issue a license to a person that the Commission determines to be qualified by experience and character to act as an ocean transportation intermediary.

46 U.S.C. § 40901.

D. Legal Analysis

1. Credibility

Complainants rely heavily on the testimony of Complainant Yakov Kobel. However, Mr. Kobel's testimony was evasive, argumentative, and not credible. For example, Complainant Kobel testified that when he received the January 9, 2009, letter from Int'l TLC requiring final payment, he "ignored it because it's an incorrect letter." F. 110. The evidence supports a finding that he actually read the letter, disagreed with it, and discussed it with Int'l TLC. *See* F. 111. While lack of credible testimony does not necessarily mean that the underlying claim lacks merit, it limits the amount of reliable evidence available to determine the merits of the claim.

2. Hapag-Lloyd

a. Section 10(d)(1) (46 U.S.C. § 41102(c))

Complainants contend that Hapag-Lloyd failed to observe and enforce just and reasonable practices in handling Complainants' property at the Port of Portland; that its handling of the damaged container in Hamburg, Germany, and Gdynia, Poland, was unreasonable and unjust; and that there was a wrongful release and damage of container MOGU2002520 in violation of section 10(d)(1), 46 U.S.C. § 41102(c), of the Shipping Act. Complainants' Reply at 2-10.

Hapag-Lloyd argues that it did not violate section 10(d)(1), 46 U.S.C. § 41102(c), of the Shipping Act because this section is inapplicable to this case; Complainants have failed to prove conduct that is a prerequisite of a violation; and even if the section applies, all of Hapag-Lloyd's conduct was reasonable. Hapag-Lloyd Brief at 31-45.

Section 10(d)(1) makes it unlawful for a common carrier to: "fail to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property." 46 U.S.C. § 41102(c). There are three separate acts which make up the claim: the damage of one container at the Port of Portland, the delay of this damaged container in Hamburg, Germany, and the delivery to another party in Gdynia, Poland, after liquidation of three containers.

i. Damage at Port of Portland

Complainants allege that Hapag-Lloyd violated section 10(d)(1), 46 U.S.C. § 41102(c), of the Shipping Act, "by shipping a damaged container, MOGU2002520, without [Complainants'] authorization and failing to return it as requested to Complainants' yard for inspection or repair and reloading before shipment." Complainants' Brief at 2-3. Complainants contend that they never authorized the Respondents to ship the damaged container and that the Respondents knew that the Complainants wanted the container returned to their yard. Complainants' Brief at 4. Complainants cite testimony of Hapag-Lloyd employee Max Furrer:

> Max Furrer admits it is not HLAG's practice to ship a damaged container, or to ship a container if a customer instructs it not to ship it. In particular, Max Furrer testified as follows:
>
> Q And is that a practice that Limco – or Hapag-Lloyd, that they don't – if a container is possibly not seaworthy or some concern, that they would not ship a damaged container?
>
> **A It's not our practice to ship a damaged container.**
>
> Q Is that pretty standard in the industry?
>
> **A I'm speaking for Hapag-Lloyd.**
>
> Q Well, I mean, if you have a container and you have a report that you have like in Exhibit 47, the incident report, and it says that – in this description of the container was not – stevedore writes: The container was not able to load due to the condition of the container, found to have damage on the top rails.
>
> Would this be, generally speaking, a container that would not be then loaded and shipped without being either repaired or replaced?

A That's correct.

Q Okay. And is it your practice at Hapag-Lloyd not to ship a container if the customer says don't ship it?

A Yes.

Q And would you say generally in either – so if – in a situation like this where you've got a damaged container and the customer says don't ship it, we want to look at it and repair it, that it would not be shipped on the – on a ship then?

A That's correct.

Complainants' Brief at 4-5, *see also* Complainants' Reply at 6. "In short, HLAG/HLAI failed to observe its own practice and accepted industry practice of shipping the damaged container contrary to the specific instructions and authorization of the shipper and also NVOCC, Limco," according to the Complainants. Complainants' Brief at 5. Complainants contends that Hapag-Lloyd had "possession and control of the damaged container, and knew that the container was on the Helsinki Express." Complainants' Brief at 5. Complainants conclude that "it was HLAI employees who instructed the stevedore to load it on the ship, issued the Seaway bill and prepared the load plan and the manifest at the time of sailing." Complainants' Brief at 6.

Respondents contend that "this was clearly an accident and Hapag-Lloyd is unaware of any precedent which would support the proposition that unintentional cargo damage is a violation of section 41102(c)." Hapag-Lloyd Brief at 37-38. Similarly, Hapag-Lloyd argues that the loading of the damaged container and the failure to return the damaged container to the Complainants "was an accident" and that "Hapag-Lloyd has found no precedent supporting the proposition that the accidental loading of a damaged cargo constitutes a violation of section 41102(c), and Complainants cite none." Hapag-Lloyd Brief at 38.

In *Patricia Eyes v. Wallenius Wilhelmsen Lines*, a claim for reparations was denied, finding that it was not unjust or unreasonable to transport a motor home damaged at an intermediate port to its ultimate destination where the carrier would have been subject to claims whether it discharged the motor home at the intermediate port or delivered it to its final destination and chose the course of conduct which was least disruptive to vessel operations. *Patricia Eyes v. Wallenius Wilhelmsen Lines,* 30 S.R.R. 1064 (ALJ 2006) (administratively final August 11, 2006). Thus, the intentional transportation of damaged cargo may be reasonable.

Section 10(d)(1) refers to "just and reasonable regulations and practices." 46 U.S.C. § 41102(c). The parties agree that the damage and loading were accidental, using Hapag-Lloyd's terminology, or outside of normal practice, using Complainant's terminology. Regardless of how it is phrased, the parties agree that damaging containers during loading, and then shipping damaged and potentially unseaworthy containers, is not Hapag-Lloyd's normal practice, rather this was an aberration from their practice. As such, it could not violate section 10(d)(1), 46 U.S.C. § 41102(c), of the Shipping Act.

The facts support this conclusion. The container was damaged in the loading process in the hold of Hapag-Lloyd's vessel, the Lisbon Express. The incident report states:

> While placing the container below deck, the container became wedged in the cell guides and was damaged. The container was already in the cell guides and going down when unforseen causes wedged the container half way down. The container was brought to the dock and found to have damage to the top rails and sides of the front of the container. The container was not able to load due to the condition of the container.

F. 52. There is no evidence that the damage occurred because of Hapag-Lloyd's regulations or practices.

The damaged container was set aside from the rest of the containers on the pier while awaiting disposition. F. 68. The Hapag-Lloyd employee who handled the damaged container rolled the booking and assigned the vessel so that if the container was repaired or transloaded, it would have guaranteed space. F. 70. The matter did not resolve quickly, in part, because the Complainants insisted on transferring the contents themselves and provided an inflated estimate of charges. F. 60-67. The damaged container was inadvertently loaded. F. 71. There is no evidence that the contents of the container were damaged, just the container was damaged. *See* F. 96. The damaged container should have more clearly been identified so that it was not shipped until the damage was resolved. However, loading a damaged container was not Hapag-Lloyd's normal practice, but rather this was an aberration from their practice. As such, it, also, could not violate section 10(d)(1), 46 U.S.C. § 41102(c), of the Shipping Act.

The parties raise the issue of whether a single act or incident can constitute a regulation and practice under this section. Complainants point to recent cases which find section 10(d)(1) violations based upon a single act or single shipment. Complainants' Reply at 5. Respondent Hapag-Lloyd cites a number of cases to argue that only in rare cases can a single act constitute "regulations and practices" for purposes of section 41102(c). Hapag-Lloyd Brief at 33.

To limit the application of section 10(d)(1) to a minimum number of offenses would have the effect of prohibiting small shippers, including individual consumers, from the benefits of the Shipping Act. Presumably, upon having a dispute with a shipper, the customer will select a different shipper for their next shipment. Violators would continue their practices unabated. In this case, however, it is not necessary to reach the single shipment issue, as it is clear that the practices complained of were not part of Hapag-Lloyd's regulations and practices.

Complainants have not demonstrated an unreasonable practice. Rather, testimony establishes that the actions complained of were, at most, the result of an accident – something outside of the normal or customary procedures. This is not a case where the Respondents said that they usually ship damaged containers, rather, it was clear from the contemporaneous documents that this was a deviation from normal procedure or practice.

ii. Delay in Poland

Complainants allege that the delay in Germany prevented the damaged container, MOGU2002520, from arriving at the final destination of Gdynia, Poland, for nearly seven months from the time of departure. Complainants' Brief at 6. The treatment of the damaged container, according to Complainants, shows "a pattern of failure to observe or enforce reasonable practices with respect to receiving, handling, and delivery of property in violation of Section 10(d)(1)." Complainants' Brief at 9.

Respondents state:

> Complainants attribute the delay of container MOGU2002520 in Germany to: (i) the possible termination of the voyage in Hamburg; (ii) the customs requirements applicable to transporting the container by truck; and (iii) the reluctance of the consignee to receive the container. None of these constitutes a pattern of deception or other egregious conduct on the part of Hapag-Lloyd that Complainants' must show in order to prevail on a claim of a violation of Section 41102(c).

Hapag-Lloyd Brief at 40 (citing Complainants' Brief at 9).

Hapag-Lloyd, in accordance with its standard procedures, contacted the consignee Baltic Sea Logistics to obtain instructions about how to deal with the damaged container. F. 81. Baltic Sea Logistics refused to take the container because it was not in touch with the ultimate consignee of the cargo and did not have commercial documents for customs. F. 82. Hapag-Lloyd, in accordance with its standard procedures for situations in which it is unable to obtain instructions from the consignee, then contacted the consignor of the cargo, Limco. F. 83.

Limco instructed Hapag-Lloyd to deliver the cargo to Gdynia, Poland. F. 83. Hapag-Lloyd requested that Limco obtain confirmation from the shipper that Hapag-Lloyd could terminate the shipment of the damaged container in Hamburg, Germany. F. 84. Limco refused to accept this proposal and insisted the container be delivered to the agreed destination of Gdynia, Poland. F. 85. HLAG discussed bringing abandonment proceedings against MOGU2002520 on September 26, 2008. F. 87. Hapag-Lloyd was receiving conflicting instructions from the consignor and consignee of container MOGU2002520. F. 89. Hapag-Lloyd worked with Limco to try to deliver the container via alternate means, including delivery by truck to Poland, delivery by truck directly to the Ukraine, and delivery by rail. F. 90.

Hapag-Lloyd eventually received assurances from Limco that if the cargo could be delivered to Gdynia, Poland, it would be picked up promptly. F. 95. The cargo in container MOGU2002520 was transferred to another container and left Germany for Poland, on or about November 15, 2008. F. 99. Container MOGU2002520, once empty, could be transported by truck without difficulty.

F. 100. Transloading of the cargo in container MOGU2002520 to another container and transport of the replacement container and empty container MOGU2002520 from Germany to Poland were performed at Hapag-Lloyd's expense. F. 101. Had Complainants authorized this transloading when the container was first damaged in Portland, delivery to Poland likely would have occurred with only minimal delay. Once the container and cargo were in Poland, the cargo was transferred back into damaged container MOGU2002520. F. 102.

Commission precedent indicates that mere delay does not constitute a violation of the Shipping Act. The Commission stated in *Meyan SA v. International Frontier Forwarders,* that:

> We note that even if a delay of two months did occur, it is unlikely that mere delay in shipping the cargo would amount to a violation of section 10(d)(1) of the Shipping Act, 46 U.S.C. § 41102(c). Previous cases have found a Shipping Act violation for prolonged delay only when additional factors are present, such as a pattern of deception.

Meyan SA v. International Frontier Forwarders, 30 S.R.R. 1397, 1400 n. 2 (FMC 2007). There are no such additional factors present here, and thus no violation of section 10(d)(1), 46 U.S.C. § 41102(c).

The Complainants have not demonstrated a pattern or failure to observe or enforce reasonable practices. Hapag-Lloyd considered a number of alternatives and continued to investigate options to transport the damaged container to its final destination. It was in Hapag-Lloyd's interest to move the containers as quickly as possible. The Complainants contributed to the delay, and lack of options, by not having a commercial invoice available and by refusing to allow Hapag-Lloyd to transload the contents of the container. A delay, under these unusual circumstances, does not support a violation of the Shipping Act.

iii. Delivery after Liquidation

Complainants allege that the three liquidated containers, MOGU2002520, MOGU2051660, and MOGU2101987, were misdelivered and that at the time the containers were released by Hapag-Lloyd to the purchaser, Oleg Remishevskiy, there was a pending claim for damage and the Complainants were the owner of the property. Complainants' Brief at 9-10. Complainants contend that wrongful delivery of cargo is grounds for a section 10(d)(1) violation. Complainants' Reply at 5.

Respondents assert that there has been no misdelivery because the consignee named on the Hapag-Lloyd sea waybills and bills of lading covering the three liquidated containers was Baltic Sea Logistics and delivery is made when cargo is put at a place of rest on the pier so that it is accessible to the consignee, and the consignee is afforded a reasonable opportunity to retrieve it. Hapag-Lloyd Brief at 44-45. Here, the cargo was delivered to its ultimate destination and Baltic Sea Logistics was notified of its arrival. The fact that the cargo was subsequently released by Baltic Sea Logistics, who was not employed by or acting for Hapag-Lloyd, does not and cannot constitute misdelivery on the part of Hapag-Lloyd. Hapag-Lloyd Brief at 45.

Although Complainants allege that they were withholding payment of freight on these two containers as a result of the problems with container MOGU2002520, Complainants were not entitled to withhold payment on these containers due to problems with another container. The liquidation of the three containers is discussed more fully below in regards to Limco and Int'l TLC. Complainants have not demonstrated that Hapag-Lloyd caused the liquidation of the three containers or that the liquidation was unreasonable. The facts in this case do not establish a misdelivery and are different from the facts in *DSW Int'l v. Commonwealth Shipping, Inc.*, 31 S.R.R. 1850 (ALJ 2011). Accordingly, Complainants have not provided evidence sufficient to find that Hapag-Lloyd violated section 10(d)(1), 46 U.S.C. § 41102(c), of the Shipping Act by damage, delay, or delivery after liquidation.

b. Sections 10(b)(4)(E), 10(b)(10) (46 U.S.C. §§ 41104(4)(E), (10))

Complainants allege a violation of section 10(b)(4)(E), 46 U.S.C. § 41104(4)(E), which prohibits an unfair practice in the adjustment and settlement of claims, and a violation of section 10(b)(10), 46 U.S.C. § 41104(10), which prohibits an unreasonable refusal to deal or negotiate. Complainants contend that Hapag-Lloyd wrongfully and without authorization shipped the damaged container from Portland, thereby depriving Complainants of an opportunity to inspect the container and either reload, replace, or repair the damaged container. Complainants' Brief at 11. Complainants argue that Hapag-Lloyd "was unreasonable in dealing with the claim resulting in an unreasonable delay in the delivery of Complainants' container. . . . HLAG has never paid any sum of money for the damaged container, expenses, and delay resulting from the wrongful shipment of this container." Complainants' Brief at 12.

Hapag-Lloyd argues that because "the shipments in question were transported under the terms of a service contract between Hapag-Lloyd and Limco, and Section 41104(4)(E) of the Act applies only to service pursuant to a tariff, Hapag-Lloyd did not violate this section of the Shipping Act." Hapag-Lloyd Brief at 48. Moreover, Hapag-Lloyd contends that this is not a situation where persons suffering similar harm are treated in a dissimilar fashion, so that section 41104(4)(E) would not apply. Regarding section 41104(10), Hapag-Lloyd contends that it did not engage in an unreasonable refusal to deal. Hapag-Lloyd Brief at 45.

Section 41104 provides:

> A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not -
>
> (4) for service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice in the matter of -
>
> (E) adjustment and settlement of claims;

(10) unreasonably refuse to deal or negotiate;

46 U.S.C. §§ 41104(4)(E) and 41104(10).

Under the plain language of the statute, the prohibition of section 41104(4) does not apply to service under a service contract. This is confirmed by the legislative history of the Ocean Shipping Reform Act of 1998, which states:

> Current section 10(b)(6), to be redesignated as section 10(b)(4), would be amended to clarify that it applies only to service pursuant to a tariff and includes charges as well as rates.

S. Rep. No. 61, 105th Cong., 1st Sess., p. 27 (1997); *see also Consumer Electronics Shippers Association v. Asia North America Eastbound Rate Agreement,* 26. S.R.R. 85, 92 (ALJ 1991).

The parties agree that the five shipments at issue in this case were transported pursuant to the terms of a service contract between Hapag-Lloyd and Limco. F. 15. Accordingly, as a matter of law, section 41104(4) does not apply to this case. Even if it did apply, there is no evidence of any unfair or unjustly discriminatory practices regarding the settlement of this claim by Hapag-Lloyd.

Complainants similarly have not demonstrated that Hapag-Lloyd unreasonably failed to deal or negotiate. Hapag-Lloyd promptly notified Limco regarding the damage. F. 54. Complainants were "persistently demanding" that the damaged container be returned to their yard and would not permit Hapag-Lloyd to transload the cargo. F. 58, 67, 75. Hapag-Lloyd agreed to consider the request and asked the Complainants' to estimate the cost. F. 59. Complainants requested a total of $10,250, not including any damage to the cargo, to transfer the shipment to another container. F. 60. Complainants included a charge of $4850 for the damaged container, which had cost them only $1700. F. 62. Hapag-Lloyd considered the expenses excessive and a contemporaneous email states this "proposal is way out of hand and unreasonable demand on the part of the shipper." F. 64. Hapag-Lloyd did not permit Complainants to inspect the damaged container on the terminal based on federally imposed security requirements. F. 65. Negotiations regarding return of the container were ongoing until the inadvertent loading of the damaged container.

It was not unreasonable for Hapag-Lloyd to cease negotiations about the cost of returning a container once it became impossible to return the container. The record reflects that loading of the container was inadvertent and that there was no financial benefit to Hapag-Lloyd in loading the container. F. 73. The evidence shows that the parties continued to negotiate regarding how to handle the damaged container until it was shipped. This does not support a finding of a refusal to deal or negotiate.

Once the container arrived in Hamburg, Germany, and the feeder line refused to take it, the parties again negotiated about how to handle the container. Hapag-Lloyd personnel again expressed concern that "[o]verseas shipper from this side is looking for opportunities to claim." F. 77. Complainants refused to accept delivery in Hamburg or to provide paperwork to clear customs.

F. 85-86. Hapag-Lloyd worked with Limco to try to deliver the container via alternate means, including delivery by truck to Poland, delivery by truck directly to the Ukraine, and delivery by rail. F. 90. Hapag-Lloyd also contemplated terminating the shipment or instituting abandonment proceedings. F. 86-87. Ultimately, with a guarantee that the shipment would be picked up at the final destination of Gdynia, Poland, Hapag-Lloyd transloaded the shipment and trucked the empty container to Poland at their expense. F. 95. The evidence demonstrates that Hapag-Lloyd continued to negotiate and offer suggestions regarding delivery of the container. The facts do not support a finding of a refusal to deal. Accordingly, Complainants have not met their burden to establish a violation of section 10(b)(4)(E) and section 10(b)(10) of the Shipping Act.

c. Sections 10(b)(4), (11), (12) (46 U.S.C. §§ 41104(4)(D), (11), (12))

Complainants' brief does not argue that Hapag-Lloyd violated sections 41104(4)(D), 41104(11), or 41104(12) of the Shipping Act, although these sections are alleged in the Amended Complaint. Amended Complaint at 14-15. Hapag-Lloyd contends that it did not accept cargo from, transport cargo for the account of, or enter into a service contract with an unbonded, untariffed NVOCC, and therefore that it did not violate these sections of the Shipping Act. Hapag-Lloyd Brief at 49-51.

As noted above in the discussion of section 41104(4)(E), the entirety of section 41104(4) deals only with tariff shipments, and the shipments herein at issue are service contract shipments. Accordingly, section 41104(4)(D) does not apply to this case. Even if it did apply, section 41104(4)(D) deals with the condition of the cargo, and no claim is made hereunder with respect to the condition of the cargo. *See Joseph and Sibyl James v. South Atlantic & Caribbean Line, Inc.*, 11 S.R.R. 639 (ALJ 1970). Accordingly, there is no evidence of a violation of section 41104(4)(D) of the Shipping Act by any of the Respondents.

Sections 41104(11) and 41104(12) make it unlawful for an ocean common carrier, either alone or in conjunction with any other person, directly or indirectly to:

> (11) knowingly and willfully accept cargo from or transport cargo for the account of an ocean transportation intermediary that does not have a tariff as required by section 40501 of this title and a bond, insurance, or other surety as required by section 40902 of this title; or
>
> (12) knowingly and willfully enter into a service contract with an ocean transportation intermediary that does not have a tariff as required by section 40501 of this title and a bond, insurance, or other surety as required by section 40902 of this title, or with an affiliate of such an ocean transportation intermediary.

46 U.S.C. §§ 41104(11), 41104(12).

The parties to this proceeding have stipulated that Limco is, and was at all material times, an ocean transportation intermediary licensed with the Federal Maritime Commission and operating lawfully as a non-vessel-operating common carrier. F. 3. Accordingly, the only basis upon which

Hapag-Lloyd could have violated sections 41104(11) or 41104(12) would be through dealings with Int'l TLC, which was not licensed with the Federal Maritime Commission at the time the shipments were made. F. 4.

The record reflects that Hapag-Lloyd had a service contract with Limco and that it did not have a service contract with Int'l TLC. F. 15-16. The record also reflects that the cargo was booked by Limco and not Int'l TLC, and that Limco paid Hapag-Lloyd's freight charges on all of the cargo. F. 7, 17. Thus, Hapag-Lloyd did not accept cargo from or transport cargo for the account of Int'l TLC, nor did Hapag-Lloyd have a service contract with Int'l TLC. The evidence does not support a finding of a violation of section 41104(11) or section 41104(12) of the Shipping Act. Moreover, as discussed more fully below, the evidence does not clearly establish whether Int'l TLC operated as an ocean transportation intermediary for these shipments.

D. Limco Logistics

Complainants accuse Limco of violating section 10(d)(1) by issuing false bills of lading and providing misleading information; violating sections 10(b)(4)(E) and 10(b)(10) by engaging in unfair shipping practices by unreasonably refusing to deal, negotiate, or settle Complainants' claim for damage; and violating section 10(b)(11) by knowingly and willfully accepting cargo from an ocean transportation intermediary that did not have a tariff, bond, or other surety as required by the Shipping Act. Complainants' Brief at 20-28.

Limco contends that it "had absolutely nothing to do with causing the damage to this container, or with the mistaken loading of this container onto the vessel" and that the "delay at the transshipment point due to the damaged condition of the container had nothing to do with the actions of Limco Logistics." Limco Brief at 7. As for the liquidation, Limco argues that it did not order, direct, or participate in that liquidation sale. Limco Brief at 5-6. Each alleged violation will be addressed in turn.

1. Section 10(d)(1) (46 U.S.C. § 41102(c))

Complainants allege that Limco failed to observe just and reasonable regulations and practices with receiving, handling, and storing property. Complainants' Brief at 14. Complainants contend that Limco violated section 10(d)(1) by changing the shipper and consignee for the three liquidated containers, MOGU2002520, MOGU2051660, and MOGU2101987; wrongfully putting a hold on Complainants' containers; unlawful delivery of containers; and issuing false bills of lading and providing misleading information about the status of the damaged container. Complainants' Brief at 14-25. Complainants point to three version of the same bill of lading issued by Limco. Complainants' Brief at 20.

Limco responds that:

> there were only two sets of bills of lading issued by Limco. The first set identifies the Complainants as the initial shipper (See Complainants Exhibits 1, 8, 9, 12 and 19), and a second set identifying Oleg Remishevskiy as the shipper following the liquidation sale

(See Complainants Exhibits 3, 13 and 20). An initial computer generated draft of a bill of lading (See Complainants Exhibits 2, 11 and 18) with corrections and additions to be made at a latter time, does not constitute 'multiple' bills of lading. There was absolutely no evidence that those drafts of the bills of lading were used for any purpose, other then as intended as a draft.

Limco Brief at 12-13.

To prove knowing and willful action, it must be shown that the person has knowledge of the facts of the violation and intentionally violates or acts with reckless disregard or plain indifference to the Shipping Act, or purposeful of obstinate behavior akin to gross negligence. *Portman Square Ltd.*, 28 S.R.R. 80, 84-85 (ALJ 1998); *see also Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd.*, 29 S.R.R. 119, 187 (FMC 2001).

Limco was not directly involved with receiving, handling, or storing property and was not responsible for the accidental damage and inadvertent loading of the damaged container. Limco promptly and reasonably responded to the situation, including coordinating negotiations between Hapag-Lloyd and Int'l TLC. The evidence demonstrates that Limco promptly conveyed information regarding the damage, inadvertent loading, and delay of container MOGU2002520 and that Limco promptly conveyed Complainants' demands regarding handling of this container. F. 55-67, 83-95. Limco placed a hold on the two undamaged liquidated containers based upon the Complainants' non-payment of freight, after those containers were transported without incident to their final destination. F. 43. Limco changed the shipper in the bills of lading at the direction of Int'l TLC after the containers were sold to a third party. F. 118-119. There is no evidence that Limco knew that the containers had been liquidated by Int'l TLC or that Limco acted unreasonably in handling any of these containers. Under these facts, Complainants have not demonstrated an unreasonable practice or procedure.

2. Section 10(b)(4)(E), 10(b)(10) (46 U.S.C. §§ 41104(4)(E), 41104(10))

Complainants allege that Limco engaged in unfair shipping practices by unreasonably refusing to deal, negotiate, or settle Complainants' claim for damages to container MOGU2002520. Complainants' Brief at 25. Specifically, Complainants allege that although Limco forwarded information about the claim to Hapag-Lloyd in May 2008 and again in October 2008 that Limco should have submitted the claim a third time. Complainants' Brief at 25. Complainants allege that as a result of Limco's failure to pursue the claim, the Complainants never recovered any compensation for the damaged container or cargo. Complainants' Brief at 26.

Limco indicates that it:

merely acted as the middleman, as it forwarded the Complainants claim for damages to Hapag-Lloyd. There never was any liability or obligation by Limco to pay for damages to the cargo that were concededly caused by the stevedores. Since there never was any obligation on behalf of Limco to pay Complainants claim, there cannot be a claim of refusing to negotiate a settlement.

Limco Brief at 13.

The evidence shows that Limco promptly conveyed Complainants' concerns to Hapag-Lloyd and conveyed Hapag-Lloyd's positions to the Complainants. Limco reasonably dealt with and negotiated Claimants' damages claim. It was Complainants' unreasonable demands, not Limco's actions, which hindered reaching a mutually agreeable resolution. There is no evidence that Limco failed to communicate or withheld any information. Accordingly, the evidence does not support a finding that Limco refused to deal, negotiate, or settle Complainants' claim for damages.

3. Section 10(b)(11) (46 U.S.C. § 41104(11))

Complainants allege that "Limco violated Section 10(b)(11) by knowingly and willfully accepting cargo from an ocean transportation intermediary that did not have a tariff, bond or other surety as a required by the Shipping Act." Complainants' Brief at 26; *see also* Complainants' Reply at 21.

Limco contends that there "is zero evidence to show that Limco knew, or had any reason to believe, that Int'l TLC was not licensed with the FMC. . . . Limco deals with hundreds of freight forwarders and other parties in their business. As a small business, it would be impossible for Limco to investigate all of its customers to verify if they were properly licensed and then to do so on a continuing basis." Limco Brief at 13-14.

Section 10(b)(11) provides:

> (b) A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not -
>
> (11) knowingly and willfully accept cargo from or transport cargo for the account of an ocean transportation intermediary that does not have a tariff as required by section 40501 of this title and a bond, insurance, or other surety as required by section 40902 of this title;

46 U.S.C. § 41104(11); *see also* 46 C.F.R. § 515.27(a) ("No common carrier may transport cargo for the account of a shipper known by the carrier to be an NVOCC unless the carrier has determined that the NVOCC has a tariff and financial responsibility.").

The parties agree that Limco did not investigate the status of Int'l TLC with the Federal Maritime Commission to determine if Int'l TLC was a licensed ocean transportation intermediary when Complainants' five containers were shipped. F. 20. However, Complainants do not point to any evidence that Limco knew or should have known that Int'l TLC was not a licensed ocean transportation intermediary. Moreover, as discussed more fully below, it is not clear whether Int'l TLC operated as an ocean transportation intermediary and no evidence that it acted as an NVOCC. Accordingly, Complainants have not met their burden to show that Limco knowingly and willfully accepted cargo from an ocean transportation intermediary that was not licensed.

E. International TLC

Complainants allege that Int'l TLC engaged in unlawful shipping activities in violation of section 19(a) and that Int'l TLC unreasonably observed regulations and practices with respect to receiving, handling, and delivering property in violation of section 10(d)(1). Complainants' Brief at 28-36. Int'l TLC contends that liquidation of Complainants' cargo to recover unpaid charges is not a Shipping Act violation and that it did not violate the Shipping Act. Int'l TLC Brief at 1-9. Each section will be discussed in turn.

1. Section 19(a) (46 U.S.C. § 40901(a)).

a. Argument of the Parties

Complainants allege that Int'l TLC engaged in unlawful shipping activities in violation of section 19(a), 46 U.S.C. § 40901(a), by operating as an ocean transportation intermediary, specifically an ocean freight forwarder, without a license with the Federal Maritime Commission. Complainants' Brief at 28-35. Complainants contend that Int'l TLC represented itself to the public as "we move cargo internationally" and that TLC "orally agreed to ship Complaints' five containers from Portland to Poland." Complainants' Brief at 30. Complainants state:

> Int'l TLC performed the following services for Complainants with respect to the shipment of the five containers: 1) booked space with Limco for cargo, 2) collected freight moneys from Complainants and paid Limco; kept money left over as its profit; 3) selected the destination agent in Poland (Baltic Sea Logistics); 4) admitted that it probably prepared packing lists for containers; 5) found containers for Complainants, but Complainant ultimately used different containers; 6) investigated shipping containers by rail from Poland to the Ukraine; and 7) The bills of lading for MOGU 2002520, MOGU 2112451, and MOGU 2003255 show Int'l TLC in the freight forwarding box.

Complainants' Brief at 30 (citations omitted).

Int'l TLC asserts that it was licensed by Washington State and operated as a loading and consulting company, and that Int'l TLC first opened as a sole proprietorship on July 2, 2005. Int'l TLC Brief at 2. Int'l TLC contends that it hired licensed NVOCCs to perform all NVOCC functions such as issuing house bills of lading and contracting with ocean common carriers. Int'l TLC applied for a domestic profit corporation license on January 2, 2008, which was issued on July 24, 2008, at which time Int'l TLC began issuing its own house bills of lading and signing into service contracts with vessel-operating common carriers. F. 4. According to Int'l TLC, "All NVOCC-related functions were performed by Limco at the time that the Complainants shipments were made. Consequently, since Int'l TLC did not operate or act as an NVOCC, it did not violate Section 19(a) of the Shipping Act." Int'l TLC Brief at 3.

b. Statutory Framework

The Shipping Act defines and regulates a number of different types of entities that are involved in the international shipment of goods by water, including two types of ocean transportation intermediaries. "The term 'ocean transportation intermediary' means an ocean freight forwarder or a non-vessel-operating common carrier." 46 U.S.C. § 40102(19). "The term 'ocean freight forwarder' means a person that – (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments." 46 U.S.C. § 40102(18).

"The term 'non-vessel-operating common carrier' means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(16). To be an NVOCC, the entity must meet the Shipping Act's definition of "common carrier."

> The term "common carrier" – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(6).

The statutory definitions are echoed in the Commission's regulations:

> *Ocean transportation intermediary* means an ocean freight forwarder or a non-vessel-operating common carrier. For the purposes of this part, the term
>
> (1) *Ocean freight forwarder* means a person that –
>
> (i) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and
>
> (ii) processes the documentation or performs related activities incident to those shipments; and
>
> (2) *Non-vessel-operating common carrier ("NVOCC")* means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

46 C.F.R. § 515.2(o).

> *Common carrier* means any person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that:
>
> (1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and
>
> (2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country . . . .

46 C.F.R. § 515.2(f); *Landstar Express Am., Inc. v. FMC*, 569 F.3d 493, 494-95 (D.C. Cir. 2009).

The Commission promulgated regulations providing examples of ocean freight forwarder services and NVOCC services performed by ocean transportation intermediaries.

> *Freight forwarding services* refers to the dispatching of shipments on behalf of others, in order to facilitate shipment by a common carrier, which may include, but are not limited to, the following:
>
> (1) Ordering cargo to port;
>
> (2) Preparing and/or processing export declarations;
>
> (3) Booking, arranging for or confirming cargo space;
>
> (4) Preparing or processing delivery orders or dock receipts;
>
> (5) Preparing and/or processing ocean bills of lading;
>
> (6) Preparing or processing consular documents or arranging for their certification;
>
> (7) Arranging for warehouse storage;
>
> (8) Arranging for cargo insurance;
>
> (9) Clearing shipments in accordance with United States Government export regulations;
>
> (10) Preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees, as required;

(11) Handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments;

(12) Coordinating the movement of shipments from origin to vessel; and

(13) Giving expert advice to exporters concerning letters of credit, other documents, licenses or inspections, or on problems germane to the cargoes' dispatch.

46 C.F.R. § 515.2(i).

> *Non-vessel-operating common carrier services* refers to the provision of transportation by water of cargo between the United States and a foreign country for compensation without operating the vessels by which the transportation is provided, and may include, but are not limited to, the following:
>
> (1) Purchasing transportation services from a [vessel-operating common carrier] and offering such services for resale to other persons;
>
> (2) Payment of port-to-port or multimodal transportation charges;
>
> (3) Entering into affreightment agreements with underlying shippers;
>
> (4) Issuing bills of lading or equivalent documents;
>
> (5) Arranging for inland transportation and paying for inland freight charges on through transportation movements;
>
> (6) Paying lawful compensation to ocean freight forwarders;
>
> (7) Leasing containers; or
>
> (8) Entering into arrangements with origin or destination agents.

46 C.F.R. § 515.2(*l*).

Section 19(a) of the Shipping Act, applicable to ocean freight forwarders and NVOCCs, requires any person acting as an ocean transportation intermediary to hold a license issued by the Commission.

> A person in the United States may not act as an ocean transportation intermediary unless the person holds an ocean transportation intermediary's license issued by the Federal Maritime Commission. The Commission shall issue a license to a person that the

> Commission determines to be qualified by experience and character to act as an ocean transportation intermediary.

46 U.S.C. § 40901; *see also* 46 C.F.R. § 515.3.

c. Analysis

An ocean freight forwarder dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers, and processes the documentation or performs related activities incident to those shipments. 46 U.S.C. § 40102(18). A non-vessel-operating common carrier does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier. 46 U.S.C. § 40102(16).

In the case at bar, Int'l TLC arranged for Limco Logistics, a licensed NVOCC, to make shipping arrangements for the Complainants' shipments. F. 3, 7. Int'l TLC accepted payment for the containers and forwarded payment to Limco. F. 32, 44, 78. Int'l TLC suggested that Baltic Sea Logistics be the agent at the destination port in Poland. F. 18. However, Int'l TLC did not issue bills of lading. *See* F. 13, 15. Complainants selected their own containers for shipping. F. 9. Complainants loaded and transported the containers to the Port of Portland. F. 23, 36, 47. When one container was over weight, Complainants resolved the problem and returned the container to the port. F. 36. There is no evidence that Int'l TLC hid the name of the NVOCC and Complainants were listed on the Limco bills of lading. F. 24, 37, 49. All five containers were booked and moved under Limco's service contract with Hapag-Lloyd. F. 15. Int'l TLC did not have a service contract with Hapag-Lloyd. Bills of lading were issued by Limco, not Int'l TLC, listing Complainant Berkovich as the shipper. F. 24, 37, 49. Complainants were responsible for making arrangements to ship the containers from Poland to the Ukraine.

These factors suggest that Int'l TLC may have acted, at most, as a freight forwarder, as Complainants have not produced evidence that Int'l TLC was holding out or assuming responsibility as would be expected from an NVOCC. Rather than assuming responsibility for the entire shipment and issuing bills of lading, Int'l TLC was, at most, facilitating the shipments. However, unlike the traditional situation where a freight forwarder handles all preliminary arrangements, here, the Complainants handled a number of traditionally freight forwarding activities themselves including purchase, loading of containers, transportation of containers to the port, and arranging transportation from Poland to the Ukraine.

It is not necessary to determine whether Int'l TLC operated as a freight forwarder on these shipments. Even if Int'l TLC had operated as an ocean freight forwarder, they met their fiduciary duty to arrange shipment to Poland. The evidence demonstrates that Int'l TLC consistently worked on Complainants' behalf in its dealings with Limco and Hapag-Lloyd. Four of the five containers arrived at their final destination on time and without incident. The cause of the liquidation of two of these containers, MOGU2051660 and MOGU2101987, was Complainants' failure to pay the agreed upon contract amount for the shipment for over five months. The damaged fifth container, MOGU2002520, was delayed, however, under the circumstances, Int'l TLC's efforts were reasonable. The damaged container was delivered to its final destination of Gydnia, Poland, where the Complainants failed to collect it so that it continued to accrue storage charges for over two months. Again, the cause of the liquidation and loss was Complainants' unreasonable delay in picking up the container and is not attributable to whether Int'l TLC was operating as an unlicensed freight forwarder. Even if Int'l TLC was operating as an unlicensed ocean transportation intermediary, Complainants have not established a casual relationship to the loss. Under the facts of this case, Complainants have not met their burden to demonstrate that Int'l TLC operated as an ocean transportation intermediary.

2. Section 10(d)(1) (46 U.S.C. § 41102(c))

Complainants allege that Int'l TLC violated section 10(d)(1), discussed above. Specifically, Complainants allege that: Int'l TLC did not have the authority to change the shipper/consignee for the bills of lading for the three liquidated containers; Int'l TLC did not have lawful authority to sell the three containers; Int'l TLC violated section 10(d)(1) by misleading Complainants and failing to provide accurate information regarding Complainants' containers; and Int'l TLC's liquidation sale was not conducted in a commercially reasonable manner. Complainants' Brief at 31-35.

Int'l TLC contends that the liquidation sale of these containers was lawful. Int'l TLC Brief at 3. Int'l TLC states:

> Int'l TLC directed Limco to change the shipper/consignee name on the bill of lading for the Complainants' three containers directly in relation to the Complainants' failure to make proper and timely payments to Int'l TLC and promptly collect their cargo overseas. The Complainants' negligence to make proper payments to Int'l TLC, their failure to pick up their cargo from Poland in a timely manner, the failure to act on the final notice of unpaid balance, and their failure to give a written response to Int'l TLC final notice resulted in the liquidation of the Complainants' three containers and does not constitute a Shipping Act violation by Int'l TLC.

Int'l TLC Brief at 4.

Int'l TLC states that there was:

> pressure put on Int'l TLC from Limco in the U.S. and Baltic Sea Logistics in Poland about the need to resolve the storage and ocean freight charges for Complainants' containers. Complainants' nonpayment of a collection of charges prevented the release of their cargo. Therefore, the liquidation of the Complainant's three containers was directly caused by the Complainants' negligence to arrange for the proper payment and pickup of their containers, and was not a violation of Section 10(d)(1) of the Shipping Act by Int'l TLC.

Int'l TLC Brief at 5 (citations omitted).

Int'l TLC contends that it "liquidated the Complainants' three containers in order to recover the costs associated with the Complainants' nonpayment of ocean freight and the failure to pick up [] their containers in Poland." Int'l TLC Brief at 6. Int'l TLC points out that Complainant Berkovich continued to do business with Int'l TLC, not once but four times after shipping the subject five containers, and even after the liquidation of the Complainants' three containers. Int'l TLC Brief at 6.

The two undamaged liquidated containers were shipped without incident to their final destination, and Complainants failed to pay for the original shipping amount quoted for over five months, while the containers accrued storage charges. Complainants' argument that the delay of the damaged container justified the delay in collecting these two containers is not tenable. Moreover, after the damaged container arrive at its final destination, it was not picked up for over two months. This case is unlike the typical alleged Shipping Act violation where an ocean transportation intermediary refuses to release cargo in order to extract more money. *See, e.g. Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11 (ALJ 1991) (freight held to pay off previous alleged debts of the freight forwarder); *Total Fitness Equipment, Inc. v. Wordlink Logistics, Inc.*, 28 S.R.R. 45 (ALJ 1997) (NVOCC refused to release cargo, demanding three times more freight money); *William J. Brewer v. Saeid B. Maralan*, 28 S.R.R. 1331 (ALJ 2000), *aff'd* in relevant part, 29 S.R.R. 6 (FMC 2001) (NVOCC refused to release goods and demanded more money than originally quoted).

Looking at the totality of the circumstances, the evidence shows that Int'l TLC shipped the two undamaged liquidated containers in July 2008 and as of the liquidation sale in late February 2009 had only been paid $1500 of the $10,200 in shipping charges for these two containers. F. 112. Although Int'l TLC had been paid shipping charges for the damaged container, storage fees were accruing and Complainants failed to pick up the container as promised. F. 113. Int'l TLC sent a final notice and invoice on January 9, 2009, which indicated that if payment was not received in full by January 14, 2009, the containers would be sold to cover costs. F. 108-111. During this whole time, the cargo was sitting in Poland, accruing storage charges, for which Int'l TLC believed it would be charged. F. 113. Claimants did not make final payment until April 2009. F. 125.

In January and February of 2009, when containers MOGU2002520, MOGU2051660, and MOGU2101987 were liquidated, there was no indication whether Complainants ever intended to pick up the containers or whether the containers would be abandoned. Likewise, there was no indication whether the Complainants would ever be able to pay for the shipping and storage charges, which were continuing to accrue. While the court has concerns about the manner in which the liquidation was completed, under the circumstances, Complainants have not established that it was unreasonable. Under these facts, where Int'l TLC completed its obligation to deliver the containers and the Complainants failed to complete their obligations to pick up and pay for the containers, the Complainants have not demonstrated that it was unreasonable for Int'l TLC to liquidate the containers in an effort to control their financial exposure and stop the accrual of additional demurrage. Accordingly, Complainants have not demonstrated a failure to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

F. Damages

Under 46 U.S.C. § 41305(b), a complainant is entitled to reparations for "actual injury caused by a violation of this part." In order to recover reparations, a complainant must show with reasonable certainty that the violation of law is the proximate cause of the loss or injury. See, *Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd.,* 29 S.R.R. 119, 187 (FMC 2001).

Complainants have the burden of proving entitlement to reparations.[5] *See James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, 30 S.R.R. 8, 13 (2003) (quoting *Waterman v. Stockholms Rederiaktiebolag Svea*, 3 F.M.B. 248, 249 (1950) ("As the Federal Maritime Board explained long ago: '(a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation.'")); *Tractors and Farm Equipment Ltd. v. Cosmos Shipping Co., Inc.*, 26 S.R.R. 788, 798-99 (ALJ 1992).

The goods in containers MOGU2112451 and MOGU2003255, which were picked up by the Complainants, have not been sold. F. 34. Complainants paid full retail price for the plywood and oil shipped in the three liquidated containers. F. 131. Complainants claim that they purchased the cargo at the value stated in the packing list for the cargo for each of the three containers, MOGU2002520, in the sum of $13,770, MOGU2051660 in the sum of $42,836, and MOGU2101987, in the sum of $57,720, although there is no way to determine exactly what was in each of the containers. F. 132. Complainants purchased three containers, MOGU2002520, MOGU2051660, and MOGU2101987 for $1,700 each from Affordable Storage on or about April 28, 2008, for a total sum of $5,100. F. 133. Complainants paid transportation costs for these containers in the sum of $2,046, for a total expense of $7,146 for Complainants. F. 133. It is not clear whether the oil in containers MOGU2051660 and MOGU2101987 could have been imported into the Ukraine, given its packaging and labeling. F. 134. It is undisputed that Complainants had no written contracts for the sale of the goods in the three liquidated containers, MOGU2002520, MOGU2051660, and MOGU2101987. F. 135.

Even if a violation of the Shipping Act were found, damages would be difficult to establish. Complainants have provided significantly inflated estimates of their damages from the beginning. *See* F. 62, 64, 98. Moreover, determination of the contents of all but the damaged container depend upon Complainants' statements. Given the rulings herein, it is not necessary to reach this issue. In addition, based upon these rulings, it is not necessary to address concerns regarding potential duplicate claims.

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[5] Reparations under the Shipping Act and damages are synonymous. *See Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 775 (2002) (Breyer, J., dissenting).

IV. ORDER

For the reasons set forth above, it is hereby **ORDERED** that the claim herein be **DISMISSED WITH PREJUDICE** and that this proceeding be **DISCONTINUED**.

Erin Masson Wirth

Erin Masson Wirth
Administrative Law Judge